March 6, 2000

Sent via e-mail and either fax, hand delivery or U.S. Mail

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

re: Bell Atlantic's Fifth Annual Price Cap Compliance Filing, D.T.E. 99-102

Dear Secretary Cottrell:

Pursuant to the procedural schedule adopted in this proceeding on February 14, 2000, the Attorney General submits his initial brief regarding the issues of the proposed reduced productivity offset and price discrimination, together with a Certificate of Service.

Sincerely,

George B. Dean

Karlen J. Reed

Assistant Attorneys General

Regulated Industries Division

GBD/kr

cc: Joan Foster Evans, Hearing Officer (2 copies) (w/enc.)

Mike Isenberg, Director, Telecommunications Division (w/enc.)

Berhane Adhanom, Senior Analyst, Telecommunications Division (w/enc.)

Service list for D.T.E. 99-102 (w/enc.)

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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New England Telephone and Telegraph)

Company d/b/a Bell Atlantic's Fifth Annual) D.T.E 99-102

Price Cap Compliance Filing)

_____)

INITIAL BRIEF OF THE ATTORNEY GENERAL

THOMAS F. REILLY

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INITIAL BRIEF OF THE ATTORNEY GENERAL

I. Introduction and Summary of Argument

Pursuant to the briefing schedule established in this proceeding, the Attorney General hereby submits his Initial Brief. The Attorney General has reviewed the comments and reply comments of Bell Atlantic-Massachusetts ("Bell Atlantic" or "the Company") on these issues, as well as the comments filed by AT&T Communications of New England, Inc. ("AT&T"), and New England Public Communications Council, Inc. ("NEPCC").

The Attorney General urges the Department of Telecommunications and Energy ("Department") to reject Bell Atlantic's attempt to deny its customers $21 million of the $48 million rate reduction which they would otherwise receive, by reducing the productivity factor from 4.1 percent to 2.94 percent. Bell Atlantic's proposal does not comply with the Department's Order in NYNEX, D.P.U. 94-50, and is inconsistent with the Department's past implementation of that order. Additionally, the Department must reject Bell Atlantic's proposed charges for Touch-tone service because these rates unjustly discriminatory and/or unduly preferential.

II. Statement of the Case

On November 17, 1999, Bell Atlantic filed revisions to its tariff M.D.T.E. No. 10 with the Department in compliance with the Department's final order in D.P.U. 94-50, as its fifth annual price cap compliance filing ("Filing"). These tariff revisions were set to take effect on January 17, 2000, unless the Department suspended or disallowed the tariff revisions. On December 6, 1999, the Department ordered Bell Atlantic to publish a notice that set dates for a public hearing, intervention, procedural conference, comments, and reply comments on the Filing.

On December 23, 1999, the Attorney General filed his notice of intervention pursuant to G.L. c. 12, § 11E, and submitted comments on Bell Atlantic's Filing ("Attorney General Comments"). In his Comments, the Attorney General urged the Department to: (1) reject Bell Atlantic's proposed reduction of the productivity factor from 4.1 percent to 2.94 percent; (2) conduct evidentiary hearings on Bell Atlantic's disparate treatment between residential and business customers for Touch-tone service; and (3) require Bell Atlantic to put into effect a compliance plan that uses the full 4.1 percent productivity factor (Attorney General Comments at 1). The Department also received comments from AT&T Communications of New England, Inc. ("AT&T"), and New England Public Communications Council, Inc. ("NEPCC"). Bell Atlantic filed reply comments on January 3, 2000 ("Bell Atlantic Reply").

The Department conducted a public hearing and procedural conference on January 5, 2000, at which time the Department granted full intervenor status to AT&T, Sprint Communications Company LP, and NEPCC, and set a procedural schedule which included time for requests for evidentiary proceedings, responses to those requests, and a briefing schedule. On January 14, 2000, the Department issued an interlocutory order allowing Bell Atlantic's proposed tariff revisions to take effect as of January 17, 2000, pending investigation by the Department.

On January 21, 2000, the Attorney General filed a request with the Department seeking evidentiary hearings on two questions: (1) whether Bell Atlantic's proposed Touch-tone Service rates were unjustly discriminatory or unduly preferential; and (2) whether the savings realized by Bell Atlantic as a result of the Department's decision in Complaint of MCI WorldCom, D.T.E. 97-116-C (May 19, 1999) should be recognized as an exogenous cost savings in the price cap formula. In that filing, the Attorney General also indicated that he was prepared, if necessary, to present evidence to rebut Bell Atlantic's earlier assertions regarding statements concerning

the productivity offset made by his witness during the course of the evidentiary hearings in D.P.U. 94-50. On January 23, 2000, NEPCC filed its first set of information requests to Bell Atlantic, which NEPCC later sought to have considered as its request for evidentiary hearings and which it even later withdrew from the Department's consideration. Bell Atlantic did not respond to these information requests. Bell Atlantic filed its opposition to the Attorney General's Request on January 26, 2000 ("Bell Atlantic Opposition").

On February 14, 2000, the Department ruled that there would be no evidentiary hearings on the Company's filing and scheduled briefing to begin without discovery, testimony, or evidentiary hearings (D.T.E. 99-102, February 14, 2000, Hearing Officer Ruling). In denying the Attorney General's request for hearings, the Hearing Officer explained that hearings were not necessary because the matters in question did not involve "issues for which the facts are disputed." In particular, the Hearing Officer: (1) incorporated by reference the evidentiary record in D.P.U. 94-50 concerning the "productivity adjustment;" (2) indicated that although evidence on the Touch-tone issue was unnecessary because Bell Atlantic's compliance with the price cap rules is not in dispute, the legal question of whether rates could be challenged notwithstanding their compliance with the Price Cap Plan could be addressed on brief; and (3) ruled that the Department's earlier order in D.T.E. 97-116-C did not involve Bell Atlantic being relieved of an obligation to pay reciprocal compensation, but rather involved a determination that Bell Atlantic had no obligation to pay for certain types of calls and that, therefore, it did not provide a basis upon which to seek any exogenous adjustment.

III. Argument

For the reasons set forth herein, the Attorney General urges the Department to reject Bell Atlantic's proposed reduction of the productivity factor from 4.1 percent to 2.94 percent. The proposed reduction of the productivity offset does not comply with the Department's Price Cap Order in D.P.U. 94-50 and is not consistent with subsequent implementation of that order. Moreover, the Department should reject Bell Atlantic's charges for Touch-tone service because the record does not support any conclusion other than that the disparate treatment of residential and business customers for the same service is unjustly discriminatory and/or unduly preferential.

A. The Department should reject Bell Atlantic's proposed reduction of the productivity factor from 4.1 percent to 2.94 percent as inconsistent with the Price Cap Plan and past implementation of the Plan.

In his Initial Comments on the Company's filing, the Attorney General urged the Department to reject Bell Atlantic's proposal to reduce the productivity offset factor in its Price Cap Plan from 4.1 percent to 2.94 percent. He argued that the proposal should be rejected because it was inconsistent with the Price Cap Plan adopted in D.P.U. 94-50, and that the claimed basis for the proposal was contradicted by the Department's past implementation of that Plan. In particular, while the Attorney General did not dispute the fact that the Department had indicated in its 1995 order that any increase in the 4.1 percent productivity offset in a particular year to reflect service quality penalties should not be carried over to subsequent years, see D.P.U. 94-50, p. 237, n. 137, he demonstrated that, contrary to the Company's assertions, there had been no carryovers in the past and that there was no need for any correction. He argued that the Company's proposal would deprive its customers of $21 million in benefits to which they were entitled under the Department's 1995 plan and that the proposal should, therefore, be rejected.

Bell Atlantic attempted to defend its proposal in its Reply Comments, but the Attorney General submits that the Company's arguments are without merit and that the proposed reduction to the Department's productivity offset should be rejected. On

Reply, Bell Atlantic argued that its proposal is appropriate because:

the Department provided that the service quality penalty adjustment would be removed in future filings once service quality thresholds are met [and that t]he only way of accomplishing that objective is to make a commensurate change in the PRI to remove the increased productivity offset.(1)

Bell Atlantic Reply at 3. The Company's argument, however, flies in the face of the plain wording of the Department's earlier order where it explained that:

Any resulting increase to the productivity offset shall not carry over to any future filings.

D.P.U. 94-50, p. 237, n. 137 (emphasis supplied). The operative language in the Department's order concerns "increases" to the "productivity offset," not decreases in the future level of the Price Regulation Index. That, however, is what Bell Atlantic intends to accomplish: to reverse reductions in the PRI that resulted from past increases in the productivity offset.

The 1995 and 1996 "increases to the productivity offset" were not carried over. Thus, the Price Cap formula specified by the Department has been applied correctly and the Department's clear intention has been implemented. The Company should not now be allowed to modify the clear terms of the Department's Price Cap Plan to require the elimination of not just the increase to the productivity offset, but also the effect of that increase. The Department should reject the Company's attempt to erase the impact on its revenues from service quality penalties by permitting larger future price increases (or lower price decreases) than would otherwise be permitted under the operation of the "inflation less X" formula.

B. The Department should reject Bell Atlantic's charges for Touch-tone service as unjustly discriminatory and/or unduly preferential.

In his Comments, the Attorney General observed that the Company had proposed to eliminate monthly charges for Touch-tone service collected for its business customers but to maintain such charges for its residential customers. While acknowledging the substantial pricing flexibility granted to Bell Atlantic under the Price Cap Plan, the Attorney General urged the Department to conduct hearings to determine whether the Company's proposal amounted to price discrimination or was part of an anti-competitive strategy. In particular, he urged the Department to:

conduct further proceedings to determine the lawfulness of Bell Atlantic's proposal to maintain Touch-Tone monthly service charges for residential customers but eliminate Touch-Tone monthly service charges for business customers.

Attorney General Comments, pp. 1, 3-4.

Accepting the Company's argument that compliance with the individual rate element pricing rules in the Price Cap Plan was a prima facie showing of the proposed rates'

lawfulness, the Department rejected the request for hearings. The Hearing Officer did, however, set for briefing the legal question of "whether these rates, which are presumed just and reasonable under the Price Cap Plan, are inappropriate pursuant to other law that controls here."

Given the record in this proceeding, the Attorney General submits that the Department should determine that "these rates" are inappropriate because they are unlawful. Whatever presumptive effect compliance with the Price Cap Plan rules may have in connection with the question of whether rates are "just and reasonable," that effect is not sufficient to negate the fact that "Chapter 159, § 14, mandates a just, reasonable, and nondiscriminatory rate structure." New England Telephone and Telegraph Company v. Department of Public Utilities, 372 Mass. 678, 684 (1977). The Company's proposal to eliminate charges for Touch-tone service for its business customers but to maintain charges for residential customers is patently discriminatory. While "different treatment for different classes of customers, reasonably classified, is not unlawful discrimination," Boston Board of Real Estate v. Department of Public Utilities, 334 Mass. 477, 495 (1956), some "reasonable justification" is necessary if "these rates" are not to be found to be "unduly or irrationally discriminatory." Attorney General v. Department of Public Utilities, 390 Mass. 208, 235 (1983) ("unless there is a reasonable justification for significant differential in the rates of return of classes, perhaps based upon differences in usage or on public policy considerations ... continuing substantial differences in the rates of return of classes may result in 'unduly or irrationally discriminatory' rates"). Chapter 159 imposes on the Department an obligation to determine whether proposed tariff provisions comply with the statutory standards. The existence of a Price Cap Plan does not extinguish this obligation, which exists even in the circumstance of a service determined to be offered in a market that is "sufficiently competitive." AT&T Communications of New England, D.P.U. 91-79, pp. 49-50 (1992) ("This review process is necessary for the Department to fulfill its statutory obligation to determine that the tariff provisions are just, reasonable, and not unduly discriminatory").

The Attorney General submits that the record here does not provide any justification for the rate differential and, thus, that the Department should determine that the proposed Touch-tone rates do not comply with the statutory standards. First, because the issue here concerns the appropriateness of continuing to collect a charge from some, but not all, of Bell Atlantic's customers, the different treatment for different classes cannot be justified on the grounds of cost differences. Whatever the Company may argue about the relative cost of providing Touch-tone service to business and residential customers, there is no reasonable basis to suggest that there are no costs involved in providing that service to business customers. Moreover, not one of the other factors which have in the past provided "justification" for rate disparities supports the rates proposed here. Both the "value of service" and relative "usage" approaches to rate setting would produce rates for business customers that are higher, not lower, than those for residential customers. Attorney General v. Department of Public Utilities, supra. The public policy in favor of competition within the market for local telephone services and protecting such competition from anti-competitive harm are hardly advanced by a proposal that shifts the entire burden for the cost of a service onto those customers least likely to have competitive alternatives. New England Telephone and Telegraph Company v. Department of Public Utilities, 372 Mass. 678, 682 (1977) (proposed rates for PBX services are "inherently discriminatory because they insulate ... PBX customers from cost increases and shift the burden of any future PBX revenue deficiencies onto other classes of customers"). In these circumstances, then, the Attorney General submits that the Department should find that "these rates" are unjustly discriminatory and/or unduly preferential, that "these rates" violate the Chapter 159 mandate against discriminatory rates, and that, therefore, "these rates" should be rejected notwithstanding their compliance with the pricing rules adopted in D.P.U. 94-50.

IV. Conclusion

For all of the foregoing reasons, the Attorney General urges the Department to

strike Bell Atlantic's proposed reduction of the productivity offset from 4.1 percent to 2.94 percent as being outside the scope of the Price Cap Plan. Additionally, the Department should reject Bell Atlantic's charges for Touch-tone service because the record cannot support any conclusion except that this classification of customers is unjustly discriminatory and/or unduly preferential under G.L. c. 159 §§ 14 and 17.(2)

RESPECTFULLY SUBMITTED

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Dated: March 6, 2000

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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New England Telephone and Telegraph Company)

d/b/a Bell Atlantic's Fifth Annual Price Cap) D.T.E. 99-102

Compliance Filing)

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding by e-mail and either hand-delivery, mail, or fax.

Dated at Boston this 6th day of March 2000.

_____

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1. The so-called "Price Regulation Index" or "PRI" component of the Department's price cap plan for Bell Atlantic is an index value that represents the maximum level that the index measuring the level of the Company's average rates can attain at any particular point in time. It represents the cumulative level of price changes permitted/required under the price cap plan. D.P.U. 94-50, at 71, 139.

2. A simple means of eliminating this problem would be for the Company to eliminate the charge for residential Touch-tone service by applying $14.5 million of the $21 million in additional rate reductions required by Bell Atlantic.